

**EXHIBIT B**  
**Redacted Version of**  
**Document Sought to be Sealed**

BOIES SCHILLER FLEXNER LLP  
Mark C. Mao (CA Bar No. 236165)  
mmao@bsflp.com  
44 Montgomery Street, 41st Floor  
San Francisco, CA 94104  
Telephone: (415) 293 6858  
Facsimile: (415) 999 9695

SUSMAN GODFREY L.L.P.  
William Christopher Carmody (pro hac vice)  
bcarmody@susmangodfrey.com  
Shawn J. Rabin (pro hac vice)  
srabin@susmangodfrey.com  
1301 Avenue of the Americas, 32nd Floor  
New York, NY 10019  
Telephone: (212) 336-8330

MORGAN & MORGAN  
John A. Yanchunis (pro hac vice)  
jyanchunis@forthepeople.com  
Ryan J. McGee (pro hac vice)  
rmcgee@forthepeople.com  
201 N. Franklin Street, 7th Floor  
Tampa, FL 33602  
Telephone: (813) 223-5505

*Attorneys for Plaintiffs; additional counsel  
listed in signature blocks below*

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
Andrew H. Schapiro (*pro hac vice*)  
andrewschapiro@quinnemanuel.com  
191 N. Wacker Drive, Suite 2700  
Chicago, IL 60606  
Telephone: (312) 705-7400  
Facsimile: (312) 705-7401

Stephen A. Broome (CA Bar No. 314605)  
stephenbroome@quinnemanuel.com  
Viola Trebicka (CA Bar No. 269526)  
violatrebicka@quinnemanuel.com  
865 S. Figueroa Street, 10th Floor  
Los Angeles, CA 90017  
Telephone: (213) 443-3000  
Facsimile: (213) 443-3100

Diane M. Doolittle (CA Bar No. 142046)  
dianedoolittle@quinnemanuel.com  
555 Twin Dolphin Drive, 5th Floor  
Redwood Shores, CA 94065  
Telephone: (650) 801-5000  
Facsimile: (650) 801-5100

*Attorneys for Defendant; additional counsel  
listed in signature blocks below*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO,  
individually and on behalf of all similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,  
Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**JOINT LETTER BRIEF IN RESPONSE  
TO ORDER RE PRIVILEGE DISPUTE  
(DKT. 487-1, DISPUTE P25)**

Referral: Hon. Susan van Keulen, USMJ

1 March 25, 2022

2 Submitted via ECF

3 Magistrate Judge Susan van Keulen  
4 San Jose Courthouse  
5 Courtroom 6 - 4th Floor  
6 280 South 1st Street  
7 San Jose, CA 95113

8 Re: Joint Submission in Response to Order Regarding Privilege Dispute (Dkt. 487-1,  
9 Dispute P25)  
10 *Brown v. Google LLC*, Case No. 4:20-cv-03664-YGR-SVK (N.D. Cal.)

11 Dear Magistrate Judge van Keulen:

12 Pursuant to Your Honor's March 15, 2022 Order (Dkt. 487-1), Plaintiffs and Google LLC  
13 ("Google") submit this joint statement regarding their disputes over (1) Plaintiffs' request that  
14 Google re-review certain documents withheld as privileged, and (2) Plaintiffs' request for *in camera*  
15 review of a document that Google clawed back and redacted in part. Counsel for the parties met and  
16 conferred and reached an impasse on these requests. Fact discovery closed on March 4, 2022. A trial  
17 date has not yet been set. Exhibit A contains each party's respective proposed order.  
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## PLAINTIFFS' STATEMENT

Google has re-reviewed 830 documents that it previously withheld as privileged, and Google has changed its position on almost 25% of them—an alarmingly high rate. But despite their diligence, Plaintiffs have barely made a dent. Over 25,000 documents remain on the log, meaning that Plaintiffs have been deprived of thousands of non-privileged documents.

To remedy this problem, Plaintiffs request the following relief. **First**, Google should re-review all documents in which either (A) a Google in-house attorney was addressed or copied but did not respond or (B) a non-lawyer employee labeled the document as “privileged.” Such characteristics bear the hallmark of Google’s internal “Communicate with Care” practice—through which Google “explicitly and repeatedly instructed its employees to shield important business communications from discovery by using false requests for legal advice.” *United States v. Google, LLC*, Case 1:20-cv-03010-APM, at Dkt. 326-1 (Mar. 21, 2022, D.D.C.) (“DOJ Sanctions Motion”) at 1. **Second**, Google should be required to re-review all documents that mention “Chrome Guard” or “ChromeGuard” because it recently came to light that Google has been improperly withholding documents related to [REDACTED].

[REDACTED]. **Third**, Plaintiffs respectfully request that the Court review *in camera* a clawed-back document containing updates to CEO Sundar Pichai about Google’s (now-abandoned) plan for [REDACTED].

### **I. Re-Review Based on Google’s “Communicate with Care” Practice**

Plaintiffs this week learned about Google’s internal “Communicate with Care” practice—through which, “[f]or almost a decade, . . . Google has trained its employees to use the attorney-client privilege to hide ordinary business communications from discovery in litigation and government investigations.” DOJ Sanctions Motion at 2. The United States Department of Justice summarized the practice in a March 21, 2022 sanctions motion:

As part of Google’s larger efforts to shield documents from production, Google employees were expressly directed to add artificial indicia of privilege on *all* written communications relating to the [case]. Google’s employees followed the Communicate-with-Care training, routinely adding in-house counsel to business communications, affixing privilege labels, and including pretextual requests for legal advice when no advice was actually needed, sought, or thereafter received. In these email chains, the attorney frequently remains silent, underscoring that these communications are not genuine requests for legal advice but rather an effort to hide potential evidence.

Google’s strategy worked. Google’s outside counsel often accepted Google employees’ artificial claims of privilege at face value.

*Id.* at 2; *see also id.* at 4-7 (excerpting images of internal Google training materials which directed employees to “include legal” and “mark content as ‘Confidential – Attorney Client Privileged’”).

Documents produced in this case show that Google applied this “Communicate with Care” practice to “Incognito-related” communications. For example, in a May 4, 2021 email, the author copied a Google lawyer and began his message with: “***Note: Please communicate with care re: Incognito-related topics.***” GOOG-BRWN-00727201 (bold and italics in original). Similarly, in a January 2021 presentation concerning efforts to “seamlessly transition display ads business to operate without 3rd party cookies,” GOOG-CABR-04830704 at -06, employees were instructed to

1 “Communicate with care: *Mark docs as ‘privileged & confidential.’ Include legal POC [point of*  
2 *contact]*,” GOOG-CABR-04830697 at -702 (emphasis added).

3 Like the documents cited in the DOJ Sanctions Motions, documents in this case show Google  
4 employees “adding in-house counsel to business communications, affixing privilege labels, and  
5 including pretextual requests for legal advice when no advice was actually needed, sought, or  
6 thereafter received.” DOJ Sanctions Motion at 2. For example, a Google product manager copied  
7 in-house attorneys Leslie Liu and Jessica Gan Lee to an April 2019 email, also affixing a “Privileged  
8 and Confidential” heading. But the author was not seeking legal advice; he just wanted to discuss  
9 an article that addressed Incognito mode, and the two attorneys he copied never responded. GOOG-  
10 CABR-05771505. Similarly, the author of a February 2021 slideshow regarding “Privacy  
11 Principles” affixed a “Privileged & Confidential Seeking Advice of Counsel” label to the  
12 presentation’s first slide. GOOG-CABR-05757127. Google’s outside counsel initially withheld both  
13 documents as “seeking advice of counsel,” thus duped by Google’s internal “Communicate with  
14 Care” practice. *See also* GOOG-CABR-05757092 (slideshow titled “Misconceptions of Incognito”  
15 that was initially entirely withheld as privileged, likely because of an improper “Privileged and  
16 Confidential” label affixed to the cover).

17 The upshot is that Google employees have indisputably tried to shield important documents  
18 from being produced in this case. Outside privilege reviewers have in some cases seen through  
19 Google’s shocking misconduct. *See* GOOG-CABR-05765032 at -35 (document initially produced  
20 in which a non-lawyer copied in-house lawyer Chelsea Tanaka on an email discussing whether  
21 Google was breaking its promises to users by collecting UMA data and where Ms. Tanaka never  
22 replied despite the use of an “adding Chelsea” signal). But there are countless documents on the  
23 privilege log where Google employees have succeeded in duping the reviewers, as evidenced by the  
24 documents discussed above, which were only produced *after* Plaintiffs challenged them. Indeed,  
25 during a meet-and-confer yesterday, Google would not clarify whether Quinn Emanuel attorneys  
26 even laid eyes on every single withheld document.

27 To remedy this problem, Plaintiffs ask that Google be ordered to conduct a targeted re-  
28 review of every document that bears a hallmark of this improper Google practice. Specifically, the  
review can be limited to documents in which either (A) a Google in-house attorney was addressed  
or copied but did not respond or (B) a non-lawyer employee labeled the document as “privileged.”  
Otherwise, Google will be rewarded for its coordinated effort to “make this [document] privileged.”  
DOJ Sanctions Motion at 12 (quoting internal Google document).

## 29 II. Re-Review of Documents Concerning “Chrome Guard”

30 Google should also be required to re-review any document with “Chrome Guard” or  
31 “Chrome Guard.” Plaintiffs are concerned that Google has improperly withheld documents related  
32 to Google’s [REDACTED]. These  
33 concerns arose when Google initially refused to produce a document called “Slides for Ads VP  
34 Steering on 12/16/2019,” which was hyperlinked to one of the financial analyses that Google did  
35 produce. Google relented when Plaintiffs asked for this document to be submitted for *in camera*  
36 review, agreeing to produce it with supposedly limited redactions. Google also informed Plaintiffs  
37 that the document is over 500 pages, which raises serious concerns about how the document could  
38 be withheld in its entirety when Google now claims that only limited portions need be redacted. The  
Chrome Guard calculations are obviously relevant to Plaintiffs’ damages calculations, and it appears  
that Google has claimed privilege over many such calculations and analyses without any basis to do  
so. A targeted re-review is warranted.

### III. *In Camera* Review of GOOG-CABR-05269357.R (clawed back document)

Plaintiffs also seek *in camera* review of a clawed-back document. Plaintiffs’ burden in seeking such review is “relatively minimal.” *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994). To meet the “lenient threshold,” the requesting party need only make a “showing sufficient to establish a reasonable belief that *in camera* review *may lead to evidence*” that the material is not privileged. *Id.* at 830 (emphasis in original). And when the challenged document has been clawed back, the Federal Rules provide that the party opposing the claim of privilege “may promptly present the information to the court under seal for a determination of the [privilege] claim.” Fed. R. Civ. P. 26(b)(5)(B).

The clawed-back document is a (now-redacted) presentation to Google CEO Sundar Pichai regarding Google’s “path forward for User Trust & Privacy,” dated March 21, 2019. The executive summary reflects the presentation’s purpose—to keep Mr. Pichai informed about privacy initiatives and to solicit his approval. GOOG-CABR-05269357.R, at -358. For example, Mr. Pichai was told about [REDACTED] which would introduce [REDACTED] [REDACTED] (which never came to pass). *Id.* at -379. The redactions in question immediately follow the slides regarding [REDACTED],” and the context suggests they are not legal, including because information about “Legal Risks” is already presented in the presentation’s appendix. Moreover, Plaintiffs reviewed and relied on this document prior to it being clawed back, and Plaintiffs recall the redactions in question discussing technical details regarding “[REDACTED]”

## GOOGLE'S STATEMENT

Plaintiffs’ motion should be denied. First, Plaintiffs’ broad requests for re-review are opportunistic fishing expeditions based entirely on an unadjudicated motion in an unrelated case and a single document Google agreed to produce after good faith re-review. Their requested relief would impose an enormous, unnecessary burden on Google, requiring it to redo a massive privilege review already conducted in good faith under extremely tight timelines, and should be denied. Second, Plaintiffs’ request for *in camera* review of two privilege redactions Google made to a 94-page presentation rests on the purported fact that the presentation was prepared to facilitate executive decision making and already has a “Legal Risks” slide somewhere else. Google’s redactions—which it has now examined three times—are proper, and Plaintiffs’ request does not withstand the high bar to seek *in camera* review.

## I. Requests for Re-Review of Google’s Documents

In a blatant circumvention of the Court’s order limiting Plaintiffs to 600 challenges, Dkt. 307, Plaintiffs seek an extraordinary order forcing Google to perform a sweeping re-review of its privileged documents with no evidence that any of those documents has been improperly withheld. Instead, Plaintiffs call Google’s entire production into question based on unfounded and unadjudicated accusations the DOJ has made in an unrelated case concerning unrelated documents, and a single document Google agreed to produce upon re-review. As to the DOJ’s sanctions motion, the accusations Plaintiffs rely upon are inaccurate and Google strongly refutes them, *see United States v. Google, LLC*, Case 1:20-cv-03010-APM, at Dkt. 328 (Mar. 24, 2022, D.D.C.) (Google’s Opposition to DOJ’s Sanctions Motion, or “Google Sanctions Opp.”) at 1–12. Plaintiffs’ request



1 should be denied.

2  
3 Much of Google’s work intersects with global legal issues, and the company’s innovative  
4 projects are subject to a complex, growing, and evolving assortment of laws and regulations. It is  
5 therefore unremarkable that Google’s employees frequently seek the advice of counsel and often  
6 mark communications as privileged where they deem appropriate. Google has a robust training  
7 program advising employees on how to recognize privilege and exercise care in disseminating  
8 communications that fall under it. What the DOJ—and by extension, Plaintiffs—leave out, is that  
9 Google’s training materials expressly instruct employees that “[m]arking [an] email or doc  
10 ‘PRIVILEGED’ does not make it so,” that “just adding a lawyer to an email/document doesn’t  
11 guarantee that it will be protected by the privilege,” and that “you can’t fake” privilege. Google  
12 Sanctions Opp. at 4–7.

13 Even with robust privilege training, Google does not blindly defer to non-attorneys’  
14 privilege labels or the mere presence of an attorney when deciding whether to produce internal  
15 documents in litigation. To the contrary, Google takes its discovery obligations seriously and  
16 employs an entire team of lawyers dedicated to fulfilling them faithfully—often producing many  
17 documents that Google employees believed may be privileged and marked as such. (Indeed, Google  
18 has produced numerous such documents to Plaintiffs in this case, as Plaintiffs’ own submission  
19 illustrates.) Google withholds documents for privilege only if, after a rigorous review, the facts  
20 indicate that the document is in fact privileged. This case is no exception. Google’s careful review—  
21 during which every document on the privilege log was reviewed by attorneys outside Google—has  
22 already factored in the possibility that communications including attorneys, requesting attorney  
23 input, or marked as privileged might nonetheless be subject to complete or partial disclosure. For  
24 that reason, there is no basis for Plaintiffs’ overreaching requests. Indeed, Google has *already*  
25 *conducted* re-reviews and de-privileging productions of its own initiative—including one to be  
26 released today—as a sanity check to ensure that documents incorrectly marked as privileged or  
27 merely including attorneys are not improperly withheld.

28 No court has ever considered—much less endorsed—the DOJ’s inaccurate allegations that  
29 Google has engaged in misleading document-labeling practices. Plaintiffs nonetheless treat those  
30 allegations as established facts, argue that documents Google has *not* withheld for privilege  
31 concerning Chrome Incognito “bear the hallmark[s]” of those practices, and speculate that “there  
32 are countless documents on the privilege log where Google employees have succeeded in duping  
33 the reviewers.” Plaintiffs’ conjecture is baseless, as their repeated unsuccessful challenges to  
34 Google’s privilege calls in this case have shown. *See, e.g.*, Dkt. 307.

35 Google has produced more than 1.1 million documents to Plaintiffs in this case. Document  
36 review and production at the scale and speed of discovery in this matter can never be perfect, and  
37 Google’s good-faith re-review of documents from the privilege log (accounting for less than 3% of  
38 responsive documents in this matter) has resulted in the production of certain documents previously  
39 withheld. Plaintiffs should not be permitted to wield this cooperation and good faith engagement  
40 with the Court’s challenge process against Google now, particularly where Google has also  
41 independently re-reviewed broad swaths of its privilege log to ensure full and fair compliance with  
42 its obligations.

1 For the same reasons, Plaintiffs’ request for Google to re-review *every single document*  
 2 referencing “Chrome Guard”—based solely on Google’s agreement to produce a single document  
 3 after good-faith re-review—is a colossal overreach. Plaintiffs’ multiple requests for re-review  
 4 would create an unfair burden for Google, which has already conducted an exhaustive review and  
 numerous re-reviews of its documents in this case. That burden is disproportionate to the fragile  
 basis Plaintiffs have to request it. The Court should deny Plaintiffs’ request.

## 5 **II. Request for *In Camera* Review of GOOG-CABR-05269357.R**

6  
 7 The Court should deny Plaintiffs’ request for *in camera* review. As the Court has explained,  
*in camera* review is a “last resort . . . [b]ecause as every litigator on this call knows, document  
 8 production does take an element of good faith and trust[,] [a]nd we have very good lawyers and  
 highly ethical lawyers on both sides on this case.” Sept. 30, 2021 Hearing Tr. 30:5–11. *In camera*  
 9 review requires Plaintiffs to “show a factual basis sufficient to support a reasonable, good faith  
 belief that *in camera* inspection may reveal evidence that information in the materials is not  
 10 privileged.” *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 2019 WL 1950377,  
 at \*2 (N.D. Cal. May 1, 2019) (citation omitted). Plaintiffs have not done so here, and their request  
 11 for *in camera* review should be denied.

12  
 13 GOOG-CABR-05269357.R is a 94-page slide presentation of which only five pages contain  
 redactions. Plaintiffs challenge the redactions on only two pages, which correspond to a single slide  
 14 and the associated presenter notes. These redactions protect content that clearly and expressly  
 reflects legal advice concerning the “Detailed Plan” described in the prior slides, including an  
 15 assessment of legal and regulatory risk. Plaintiffs appear to agree (as they should) that the  
 information about “Legal Risks” in the presentation’s appendix is appropriately subject to privilege.  
 16 The challenged redactions are likewise protected.

17  
 18 Plaintiffs’ only justification for requesting *in camera* review of this presentation—the vast  
 majority of which Google has produced without redactions—is that it provides information on  
 Google’s privacy initiatives (a topic deeply integrated with legal and regulatory issues), in part to  
 19 solicit executive approval. Such presentations commonly contain legal analysis rendered by  
 counsel—advice critical to executive decisionmaking—and that is exactly what GOOG-CABR-  
 20 05269357.R reflects. *See* Oct. 27, 2021 Hearing Tr. 9:13-19 (“[Y]ou often have non-lawyers  
 transmitting legal advice, sharing legal advice, acting on legal advice that is reflected in a document,  
 21 and as we know from the -- from the Ninth Circuit, transmitting legal advice, sharing it, discussing  
 it, even without the lawyer, is still within the coverage of attorney-client privilege.”). Plaintiffs’  
 22 suggestion that the redacted content is not privileged is a complaint that the redactions appear too  
 close to the slides describing the privacy initiatives discussed in the presentation. That challenge  
 23 makes no sense, and should be denied.

24  
 25 Notably, Google has now reviewed GOOG-CABR-05269357.R for privilege three times—  
 once initially, again in a prior re-review that resulted in narrowed redactions, and yet a third time in  
 26 response to Plaintiffs’ instant motion. The redactions Plaintiffs challenge are proper, and *in camera*  
 review is not warranted here. In the event the Court determines that it will review GOOG-CABR-  
 27 05269357.R *in camera*, Google respectfully requests sufficient notice to be able to procure  
 declarations from the appropriate attorneys as to the privileged nature of the document.  
 28



Respectfully,

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

BOIES SCHILLER FLEXNER LLP

/s/ Andrew H. Schapiro

/s/ Mark C. Mao

Andrew H. Schapiro (admitted *pro hac vice*)

Mark C. Mao (CA Bar No. 236165)

andrewschapiro@quinnemanuel.com

mmao@bsfllp.com

191 N. Wacker Drive, Suite 2700

Beko Reblitz-Richardson (CA Bar No.

Chicago, IL 60606

238027)

Tel: (312) 705-7400

brichardson@bsfllp.com

Fax: (312) 705-7401

44 Montgomery Street, 41<sup>st</sup> Floor

San Francisco, CA 94104

Stephen A. Broome (CA Bar No. 314605)

Tel: (415) 293 6858

sb@quinnemanuel.com

Fax: (415) 999 9695

Viola Trebicka (CA Bar No. 269526)

violatrebicka@quinnemanuel.com

James W. Lee (*pro hac vice*)

865 S. Figueroa Street, 10th Floor

jlee@bsfllp.com

Los Angeles, CA 90017

Rossana Baeza (*pro hac vice*)

Tel: (213) 443-3000

rbaeza@bsfllp.com

Fax: (213) 443-3100

100 SE 2<sup>nd</sup> Street, Suite 2800

Miami, FL 33130

Josef Ansorge (admitted *pro hac vice*)

Tel: (305) 539-8400

josefansorge@quinnemanuel.com

Fax: (305) 539-1304

1300 I Street NW, Suite 900

Washington D.C., 20005

Tel: (202) 538-8000

Fax: (202) 538-8100

William Christopher Carmody (*pro hac vice*)

bcarmody@susmangodfrey.com

Shawn J. Rabin (*pro hac vice*)

srabin@susmangodfrey.com

Steven Shepard (*pro hac vice*)

sshepard@susmangodfrey.com

Alexander P. Frawley (*pro hac vice*)

afrawley@susmangodfrey.com

SUSMAN GODFREY L.L.P.

1301 Avenue of the Americas, 32<sup>nd</sup> Floor

New York, NY 10019

Tel: (212) 336-8330

Jonathan Tse (CA Bar No. 305468)

jonathantse@quinnemanuel.com

50 California Street, 22nd Floor

San Francisco, CA 94111

Tel: (415) 875-6600

Fax: (415) 875-6700

Thao Thai (CA Bar No. 324672)

thaothai@quinnemanuel.com

555 Twin Dolphin Drive, 5th Floor

Redwood Shores, CA 94065

Tel: (650) 801-5000

Fax: (650) 801-5100

Amanda Bonn (CA Bar No. 270891)

abonn@susmangodfrey.com

SUSMAN GODFREY L.L.P.

1900 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

Tel: (310) 789-3100

*Attorneys for Defendant Google LLC*

1 John A. Yanchunis (*pro hac vice*)  
2 [jyanchunis@forthepeople.com](mailto:jyanchunis@forthepeople.com)  
3 Ryan J. McGee (*pro hac vice*)  
4 [rmcgee@forthepeople.com](mailto:rmcgee@forthepeople.com)  
5 MORGAN & MORGAN, P.A.  
6 201 N Franklin Street, 7th Floor  
7 Tampa, FL 33602  
8 Tel: (813) 223-5505  
9 Fax: (813) 222-4736

10 Michael F. Ram (CA Bar No. 104805)  
11 [mram@forthepeople.com](mailto:mram@forthepeople.com)  
12 MORGAN & MORGAN, P.A.  
13 711 Van Ness Avenue, Suite 500  
14 San Francisco, CA 94102  
15 Tel: (415) 358-6913

16 *Attorneys for Plaintiffs*  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
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**ATTESTATION OF CONCURRENCE**

I am the ECF user whose ID and password are being used to file this Joint Letter Brief. Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in the filing of this document.

Dated: March 25, 2022

By /s/ Andrew H. Schapiro  
Andrew H. Schapiro